***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

567

# BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,709

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UNITED STATES OF AMERICA

v.

ROBERT W. GORDON, Appellant

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APPEAL FROM A JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

---



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Cc

## QUESTION PRESENTED

(1) In a trial upon an indictment for armed robbery or robbery and assault with dangerous weapon, should the Court have directed a verdict of acquittal if the evidence was uncontroverted that the accused appeared to be acting under a claim of right?

The pending case was not previously before this Court under the same or similar title.

AUTHORITY RELIED ON

## REFERENCES TO RULINGS

In denying defendant's renewed motion for a directed verdict of acquittal, the Court did not set forth reasons for its ruling. (Tr. 102)

## JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction of this case. D.C. Code 11-521 (Supp. IV 1965). Application for leave to proceed on appeal was timely made and granted. This Court has jurisdiction to hear this appeal. 28 U.S.C. 1291, 1915 (1964).

## STATEMENT OF THE CASE

Appellant was charged on three counts, armed robbery (22 D.C.C. 2901), robbery (22 D.C.C. 3202) and assault with dangerous weapon (22 D.C.C. 502). The first and second counts of the indictment charged that on or about July 14, 1968, within the District of Columbia, appellant, (while armed with a dangerous weapon, that is, a knife, in the first count), by force and violence and against resistance and by putting in fear, stole and took from the person and immediate actual possession of George M. Mitchell, property of George M. Mitchell, of the value of about $27.00, consisting of $27.00 in money. The third count charged that on or about July 14, 1968, within the District of Columbia, appellant assaulted

George M. Mitchell with a dangerous weapon, that is, a knife.

These charges were tried on November 26 and 27, 1968 by a jury in the United States District Court for the District of Columbia before the Honorable Oliver Gasch. The complainant (Mr. Mitchell), the barber in whose shop the alleged offenses occurred (Mr. Crawford) and the arresting officer on stipulation were called as witnesses by the Government; the accused testified on his own behalf.

It appeared from the testimony that the accused and a third person followed complainant into Mr. Crawford's barber shop. The third person took or obtained a sum of money from complainant while the accused held an open knife in the vicinity of complainant. The accused testified that he kicked the knife out of complainant's hand to protect the third person; ownership or possession of the knife was denied by complainant. The accused also testified that he did not act in concert with the third person and that the third person was unknown

to him. It further appeared from the testimony that complainant knew the accused as Flash Gordon; the extent of this knowledge and the nature of their relationship was disputed. The accused testified that the incident arose out of a narcotics transaction but this was strenuously denied by complainant. The knife was found in the accused's possession at the time of his arrest about a week later.

Appellant's motion for a directed verdict of acquittal was denied. The case was sent to the jury and appellant was found guilty of armed robbery (thereby mooting robbery) and assault with dangerous weapon.

## ARGUMENT

The Court erred in denying appellant's motion for a directed verdict of acquittal since the evidence was uncontroverted that appellant lacked the requisite intent.

> "...A defendant is not guilty of robbery unless he has a specific intent to take the property of another..." Richardson v. United States, 403 F. 2d 574.

It is submitted that this lack of specific intent extends to the assault charged since the essential elements of assault with dangerous weapon are included within the essential elements of armed robbery. Thus, lacking the specific intent to commit armed robbery, appellant lacked the specific intent to commit the assault as well.

Evidence was given by the proprietor of the barber shop in which the alleged offenses occurred that appellant behaved as if he was attempting to recover his own money. Such evidence appeared throughout the barber's testimony. Referring to the reporter's transcript, the barber testified on direct and cross-examination as follows:

> Q. And what happened in the shop as the two men approached Mr. Mitchell?
>
> A. He asked him, give me my money, that is what he asked, give me my money ... I wouldn't say give me my money ... (Tr. 69)
>
> Q. When he sat down in the chair, did you at that point notice anything alarming about their conduct when the first man sat down?

A. When he sit down, one walked past him and the other one on each side of him. The man had a king pin and slapped him and the other one said, "Give me my money".

Q. Who said that?

A. The one sitting there. (Tr. 71-72)

Q. Did you see them go into his pocket?

A. I didn't see them go in his pocket, I didn't see no money, but one said, give me my money.

Q. All right.

A. Give me my money here. (Tr. 77-78).

Q. Now, after one of the men, Mr. Crawford, said, give me my money, what did that man [Mr. Mitchell] say?

A. He said I don't have your money.

Q. Please?

A. I don't have your money.

Q. I don't have your money?

A. I don't have your money.

Q. Did he use the words "your money"?

A. I don't have your money.

Q. Please?

A. I don't have your money, he said.

Q. Are you sure he said that?

A. To my knowing, that is what he said.

Q. Who did he say it to?

A. He was saying it to them both.

Q. What did he say?

A. Give me my money.

Q. What did he say?

A. He said I ain't got your money. (Tr. 80-81)

Complainant knew the accused at least by nickname.

Q. You had known, had you not, Mr. Mitchell, the defendant Robert Gordon for some time?

A. I had seen him as Flash Gordon, I did not know him ...his correct name, all I know was Flash Gordon. I had seen him around. (Tr. 37)

It is difficult to believe that the accused would have followed complainant, a person who could and apparently did identify the accused to the police, into a barbershop and in the presence of bystanders with the intent to commit robbery. Further, no evidence was offered that the accused took money from complainant.

Whether appellant's claim of right was valid in fact is not at issue.

> "...specific intent depends upon a state of mind, not upon a legal fact..." Richardson v. United States, supra.

The barber's reiterated testimony that the accused behaved as if he had a claim of right was uncontroverted and there was no evidence of intent for consideration by the jury. Accordingly, the Court erred in sending the case to the jury, even with the Court's special instruction that the Government had the burden of proving intent.

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Appellant submits that there were at the time of his trial and are available now persons who can testify to the fact that appellant and complainant have known each other for many years. Appellant has obtained the following notarized statements from inmates at Lorton:

"In the matter of:

Robert H. Gordon,
defendant

vs.

United States

Case No. _____

AFFIDAVIT

"I, Emory Sykes, depose and say that I am presently confined in the Penitentiary Division of the Lorton Reformatory awaiting trial on a charge of grand larceny.

"On November 25, 1968 I was in the U.S. District Court for the District of Columbia, having just concluded an interview with an attorney for the Legal Aid Agency when I was approached by Mr. Trainer, attorney for the

defendant, and asked, at the request of the defendant, Robert W. Gordon, if I knew how long the defendant and one Mr. "Boxie" Mitchell had known each other. I told him that, to my knowledge, it was in excess of ten years.

" I began using narcotics (heroin) in September of 1956 and shortly thereafter became acquainted with Mr. Mitchell, known to me as "Boxie" Mitchell, who was at the time, and periodically up until at least the time of my present incarceration in September of 1968, a seller of heroin. During the same period after I began using drugs I also met and became acquainted with the defendant, Robert W. Gordon, known to me as "Flash" Gordon, also a user of heroin. In the process of conducting affairs related to being a drug addict I came in contact Mr. Mitchell on various occasions, both singly and in each others company. Therefore I can say with certainty that they have known and

had dealings with each other since at least 1957.

"I certify that the above statement is true to my best knowledge and belief.

Respectfully submitted,

/s/ Emory Sykes

NOTARY PUBLIC

"Subscribed and sworn to before me, a Notary, this 23rd day of May, 1969.

/s/ Edward M. Matse
Notary Public

(SEAL)

My commission expires March 11, 1973"

"May-14-1969

time 10:20 A.M.

"To whom it may concern.

The following is written to the best of my knowledge.

"I have known Robert Gordon for at least 20 years. I have known Mr. Mitchell (Boxie)

for about the same. Both Mr. Mitchell and Mr. Gordon had known one another prior to my knowing either of them.

"The above is to my knowledge the truth

/s/ Louis W. Baskerville

(SEAL) /s/ Edward H. Matse
Notary Public

May 14, 1969

My Commission Expires March 11, 1973"

The following statement, signed but not notarized, was obtained from two residents of the District of Columbia:

"Washington, D. C.

"To Whom It May Concern

Dear Sir:

This is to state that I personally know that Robert Gordon and Boxie Mitchell are known to each other.

"And that they have known each other for better than ten years.

Thank you.

/s/ Mary I. Howard
and separately
/s/ Dallas Baylor"

The Government is being provided xerox copies of these statements.

It is appreciated that these statements are somewhat informal in nature and that no opportunity has been given the Government to cross-examine the makers of these statements. However, it is submitted these statements indicate that there were potential witnesses available who could have substantiated certain essential aspects of appellant's testimony and thus appellant did not have his full day in Court below.

## CONCLUSION

For the reasons stated above, it is urged that the judgment of conviction against appellant be reversed or that the judgment be set aside and the case remanded for a new trial.

Respectfully submitted,

Albert Tockman

Albert Tockman
Attorney for Appellant
(Appointed by this Court)

## CERTIFICATE OF SERVICE

I hereby certify that I have served on the Honorable Thomas A. Flannery, Esq., U.S. Attorney, this 2nd day of June 1969, a copy of the foregoing Brief for Appellant.

Albert Tockman

Albert Tockman

# REPLY BRIEF FOR APPELLANT

IN THE

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No. 22,709

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UNITED STATES OF AMERICA



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APPEAL FROM A JUDGMENT OF THE

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Washington, D. C. 20004

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# INDEX



## AUTHORITY RELIED ON

## ARGUMENT

Appellee has offered a rather strained analysis of this Court's decision in Richardson v. United States F.2d 574. The language in that decision with regard to specific intent and its dependence upon a state of mind is crystal clear:

> "...A defendant is not guilty of robbery unless he has a specific intent to take the property of another..." (at 575)

> "...But...specific intent depends upon a state of mind, not upon a legal fact..." (at 576)

Appellant's unsuccessful defense below was based on his contention that he was attempting to recover his own money, i. e., a claim of right. The validity of appellant's claim of right (about which there was conflicting testimony) is not an issue in this appeal. It is the evidence with regard to the accused's state of mind at the time the acts alleged in the indictment were committed that is to be reviewed here.

It remains appellant's position that he lacked the requisite intent to commit the offenses charged and that his evidence to this effect was not controverted. As set forth in appellant's brief, testimony by the barber indicated that the accused behaved as if he were attempting to recover his own money and corroborated appellant's testimony in this respect. The complainant strenuously denied the factual basis for appellant's claim of right but was uncertain as to appellant's state of mind.

> Q. To your knowledge, did he [the accused] think you owed him something?
>
> A. That is impossible for me to say. (Tr. 41)

No evidence was offered to show that the accused did not really believe he was attempting to recover his own money.

The Court below erred in permitting the case to go to the jury--even with a special instruction on the defense of claim of right--because there was no

conflicting testimony as to the accused's state of mind for consideration by the jury. The evidence that appellant lacked the specific intent to commit the offenses charged was uncontroverted.

The Richardson decision explicitly holds that specific intent is a necessary element of robbery (the assault conviction in Richardson was not contested on appeal). Assault requires that "...[the accused] intended to do the act which constituted the assault." (Tr. 134) Appellee's brief is silent on appellant's submission that the lack of specific intent to commit armed robbery extends to the assault charged since the elements of assault with a dangerous weapon are included within the elements of armed robbery.

## CONCLUSION

For the reasons stated above and in appellant's brief, it is urged that the judgment of conviction against appellant be reversed or that the judgment be set aside and the case remanded for a new trial.

Respectfully submitted,

Albert Tockman
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have served on the Honorable Thomas A. Flannery, Esq., U. S. Attorney, this 15th day of August, 1969, a copy of the foregoing Reply Brief for Appellant.

Albert Tockman